STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2003
v	No. 237794 Wayne Circuit Court
DENNIS L. NICKENS, Defendant-Appellant.	LC No. 00-013258-01

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

METER, J. (*dissenting*).

I respectfully dissent because I believe the error in submitting the lesser-included offense charges to the jury was harmless.

As noted by the majority, the Supreme Court recently determined in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), that MCL 768.32 only permits a trial court to instruct the jury with respect to necessarily lesser-included offenses and not with respect to cognate lesser-included offenses. See, e.g., *Cornell*, *supra* at 359. The majority concludes that because aggravated assault and assault with intent to commit criminal sexual conduct involving penetration are merely cognate lesser-included offenses of first-degree criminal sexual conduct involving personal injury,[1] reversal is necessary. However, the Court in *Cornell* also stated that "harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses . . . ."[2] *Id.* at 361. The Court cited MCL 769.26, which states, in part, that

> [n]o judgment or verdict shall be set aside or reversed or a new trial granted by any court of this state in any criminal case, on the ground of misdirection of the jury . . . unless . . . it shall affirmatively appear that the error complained of resulted in a miscarriage of justice.

[1] This conclusion is arguable and is not, contrary to the majority's statement, conceded by the prosecutor on appeal.

[2] While the *Cornell* Court was specifically referring to whether the *failure* to provide a lesser-included offense instruction after a proper request could be deemed harmless error, I see no logical reason why the harmless error rule would not similarly apply to the *giving* of such an instruction in the face of an objection.

The Court also cited MCR 2.613(A), which states, in part, that "[a]n error or defect in anything done or omitted by the court . . . is not ground for granting a new trial . . . unless refusal to take this action appears to the court inconsistent with substantial justice."

The Court then classified the error at issue in *Cornell* as preserved and nonconstitutional, see *Cornell*, *supra* at 363, and stated, "Therefore, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included misdemeanor instruction undermined reliability in the verdict." *Id.* at 364. Similarly, I would classify the error here as preserved and nonconstitutional and would review this case to determine if the giving of the instruction undermined reliability in the verdict.

I cannot conclude that the giving of the instruction undermined reliability in the verdict. Indeed, defendant had fair notice that he might have to defend against the lesser-included offenses, given the extremely close kinship, under the facts of this case, between those offenses and the charged offense of first-degree criminal sexual conduct involving personal injury. In addition, the victim's testimony in this case – she stated that defendant beat her, pushed her, bruised her, caused her to vomit, penetrated her mouth with his penis, and ejaculated on her – overwhelmingly supported defendant's ultimate conviction of assault with intent to commit criminal sexual conduct involving penetration. See *id.* at 366 (explaining that a court must examine the evidence admitted at trial in determining whether an instructional error was harmless). I simply cannot conclude that the giving of the contested instructions in this case undermined the reliability of the verdict or resulted in a miscarriage of justice.[3]

Moreover, I do not believe that the additional issues raised by defendant on appeal warrant reversal.

I would affirm.

/s/ Patrick M. Meter

[3] For example, I do not believe that a different result would have occurred if defendant had been charged in the original information with aggravated assault and assault with intent to commit criminal sexual conduct involving penetration.